

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE FOR THE TWENTIETH
JUDICIAL DISTRICT AT NASHVILLE

STATE OF TENNESSEE,
Plaintiff,

v.

WILLIAM ANDREWS, individually and,
d/b/a Body by Me and Body 2,

Respondent.

ASSURANCE OF VOLUNTARY COMPLIANCE

THIS ASSURANCE OF VOLUNTARY COMPLIANCE ("Assurance") is given by William Andrews, individually and d/b/a Body by Me and Body 2 of Greenville, Tennessee ("Respondent"), to John Knox Walkup, Attorney General and Reporter for the State of Tennessee ("Attorney General").

WITNESSETH:

Some of the facts and circumstances surrounding the execution of this Assurance are as follows:

A. The Division of Consumer Affairs of the Department of Commerce and Insurance (the "Division") and the Attorney General conducted an investigation of specific business practices of the Respondent. These practices include operating Body by Me and Body 2 health clubs without valid certificates of registration from the Division. The health clubs were unregistered because the Respondent used membership agreements that had been rejected by the Division of Consumer Affairs. The membership agreements did not comply with statutory contractual requirements of the Health Club Act. Also, Respondent misrepresented in these membership agreements that consumers were provided certain consumer protections when that was not the case. Respondent's business practices are more fully described in the State's accompanying Petition. As a result of the investigation, the Division and the

Attorney General determined that certain acts and practices of Respondent violated the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101, *et seq.* (the "Act").

B. Respondent neither admits nor denies any wrongdoing. Pursuant to Tenn. Code Ann. § 47-18-108(c), this Assurance shall not be considered as an admission of a prior violation of the Tennessee Consumer Protection Act.

C. Respondent desires to give this Assurance, and the Attorney General desires to accept it, in order to avoid the costs and expense of litigation.

NOW, THEREFORE, acting pursuant to Tenn. Code Ann. §47-18-107, Respondent gives, and the Attorney General accepts, the following assurances:

1. JURISDICTION

1.1 Jurisdiction of this Court over the subject matter herein and over the person of the Respondent for the purposes of entering this Assurance and Agreed Order is admitted. Jurisdiction is retained by the Court for the purpose of enabling the State to apply to the Court for such further orders and directions as may be necessary or appropriate for the construction, modification or execution of this Assurance and Agreed Order, including the enforcement or compliance therewith and penalties for violation thereof.

Respondent agrees to pay all court costs and attorneys' fees associated with any petitions to enforce any provision of this Assurance and Agreed Order against Respondent.

2. BUSINESS PRACTICES

Accordingly, it is hereby agreed that upon approval of the Court, Respondent shall be permanently and forever enjoined and bound, directly or indirectly, from engaging in the practices set forth herein:

2.1 Respondent shall not directly or indirectly, engage in any unfair or deceptive acts or practices in the conduct of its/his business. Respondent shall abide by all provisions of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101, *et seq.*, including, but not limited to, the sections of the Act regulating health clubs, Tenn. Code Ann. § 47-18-301 through §47-18-320 ("the Health Club Act").

2.2 Respondent shall not directly or indirectly, own, operate, manage, promote or be employed by a health club as defined by the Health Club Act in the State of Tennessee, unless the health club is in full compliance with the Health Club Act.

2.3 Respondent shall be prohibited from directly or indirectly, representing, advertising, promoting or stating that any membership agreements are enforceable against consumers. Unenforceable membership agreements are those agreements which were signed by consumers during the periods of time that Body by Me and Body 2 were operating without a valid certificate of registration from the Division.

2.4 Respondent shall be prohibited from directly or indirectly, attempting to collect or collecting against any consumer for unenforceable membership agreements. Without limiting the scope of this section, Respondent shall be required to notify all collection agencies to cease collection activities if collection efforts have been commenced against a consumer for failure to complete payment under the unenforceable health club agreements.

2.5 Respondent shall be required to affirmatively correct any consumer's credit history or record upon which Respondent or Respondent's agents have reported negative information relating to an unenforceable Body by Me or Body 2 health club agreement. Without limiting the scope of this section, Respondent shall provide a copy of the affirmative correction to the affected consumer for their records and make these records available to the State, upon request.

2.6 Respondent shall not, directly or indirectly, represent, state, promote, advertise or claim that goods or services are of a particular standard, quality or grade, if they are of another.

2.7 Respondent shall not, directly or indirectly, represent, state, promote, advertise or claim that a consumer transaction confers or involves rights, remedies or obligations that it does not have or involve or which are prohibited by law.

2.8 Respondent shall make and retain contemporaneous records of all consumer complaints or inquiries made orally or by telephone and shall make such records available to the State upon request.

2.9 Respondent shall retain in an organized fashion all written material containing or representing consumer complaints or inquiries and make such materials available to the State upon request.

2.10 Respondent shall not, directly or indirectly, represent, promote or advertise that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have. Without limiting the scope of this section, Respondent shall not directly or indirectly, represent, promote or advertise that Body by Me and Body 2 contracts have the approval of the State of Tennessee, the Office of the Attorney General or the Division of Consumer Affairs, when such is not the case.

2.11 Without limiting the scope of the previous section, Respondent shall not disseminate any contract or health club agreement which represents, promotes or advertises that Body by Me and Body 2 health clubs have the approval of the State of Tennessee, the Office of the Attorney General or the Division of Consumer Affairs, when such is not the case.

2.12 Without limiting the scope of the previous section, Respondent shall not represent, promote or advertise, through any contract or health club agreement, that Body by Me and Body 2 health clubs have the approval of the State of Tennessee, the Office of the Attorney General or the Division of Consumer Affairs by using the following or similar language:

(A) "Body by Me! is registered with the Tennessee Department of Consumer Affairs, as a Health Club, and is in compliance with State Consumer Laws. When you sign this Agreement, you are protected against abuses and consumer fraud practiced by some Health Clubs" or

(B) "Body 2 is in compliance with State Consumer Laws. When you sign this Agreement, you are protected against abuses and consumer fraud."

2.15 Neither Respondent nor anyone acting on its behalf shall directly or indirectly, state, represent or cause to be stated that the Attorney General, the Division of Consumer Affairs, or any other governmental unit of the State of Tennessee approved, sanctioned, or authorized any practice, act, or conduct of the Respondent.

2.16 Respondent shall not directly or indirectly, represent or state that any procedure or other acts or practices hereafter used or engaged in by Respondent has been approved, in whole or in part, by the State.

3. PAYMENT OF ATTORNEYS' FEES AND COSTS TO THE STATE

3.1 Respondent, shall pay the sum of One Thousand and 00/100 (\$1,000.00) to the State of Tennessee to reimburse the State for attorneys' fees and costs of investigation and prosecution of this matter, which may be used for consumer protection purposes at the sole discretion of the Attorney General. Respondent shall make payments consistent with paragraph 5.1 below.

4. CIVIL PENALTIES

4.1 Respondent, shall pay the State of Tennessee the amount of One Thousand and Nine Hundred and 00/00 Dollars (\$1900.00) as a civil penalty in this matter pursuant to Tenn. Code Ann. § 47-18-107(f). Respondent shall make payments consistent with paragraph 5.1 below.

5. METHOD OF PAYMENT OF ATTORNEYS' FEES AND COSTS AND CIVIL PENALTIES

5.1 Payment of attorneys' fees and costs pursuant to paragraph 3.1 and civil penalties pursuant to paragraph 4.1 shall be made to the Consumer Protection Division, Office of Attorney General as follows: \$400.00 due January 15, 1999 followed by monthly payments beginning February 15, 1999 each in the amount of \$250.00 due on the fifteenth (15th) day of each successive month until the entire balance is paid in full. All payments shall be in the form of a certified or cashier's check made payable to the State of Tennessee.

5.2 Respondent shall be required to retain proof of all payments to the State in the form of canceled checks for each payment for a full twenty-four (24) months following his final payment to the State. Respondent shall provide proof of all payments to the State within ten (10) days of a request for such information.

5.3 Respondent agrees that any and all such sums are non-dischargeable in a bankruptcy proceeding given that same are punitive in nature.

5.4 Respondents payments shall first be applied to satisfy attorneys' fees and costs as provided in paragraph 3.1 and remaining payments shall be applied to satisfy the civil penalty pursuant to paragraph 4.1 until the balance of same is satisfied.

6. MONITORING AND COMPLIANCE

6.1 Upon request, Respondent agrees to provide books, records and documents to the State at any time, and to informally, or formally under oath, provide testimony or other information to the State relating to compliance with this Assurance. Respondent shall make any requested information available within one (1) week of the request, at the Office of the Attorney General or at any other location within the State of Tennessee, that is mutually agreeable to Respondent and the Attorney General. This section shall in no way limit the State's right to obtain documents, information, or testimony pursuant to any federal or state law, regulation, or rule.

7. PRIVATE RIGHT OF ACTION

7.1 Pursuant to Tenn. Code Ann. §47-18-107, nothing in this Assurance shall be construed to affect any private right of action that a consumer may hold against Respondent.

8. PENALTY FOR FAILURE TO COMPLY

8.1 Respondent understands that failure to comply with the terms of this Assurance is prima facie evidence of a violation of the Tennessee Consumer Protection Act. 8.2 Respondent understands that any knowing violation of the terms of this Assurance shall be punishable by civil penalties of not more than One Thousand Dollars (\$1,000.00) for each violation, in addition to any other appropriate sanctions, including contempt sanctions. Respondent agrees to pay all court costs and attorneys' fees associated with any petitions to enforce this Assurance and Agreed Order against Respondent.

9. RESTITUTION

9.1 Respondent warrants that all consumer memberships entered into during Respondent's period of unregistration have expired and there currently no consumers with such unenforceable agreements. In the event that Respondent's warranty is found to be false it shall be treated as a knowing violation of this Assurance as to each unenforceable membership agreement found to exist. In addition, consumers with unenforceable agreements shall be notified by Respondent, and at Respondent's cost, of their right to cancel their membership and to receive a refund or that portion of any down payment, enrollment fee, membership fee, or other fee that does not represent payment for actual use of the facilities and for goods and services actually provided.

10. VENUE

10.1 Pursuant to Tenn. Code Ann. §47-18-107, venue as to all matters between the parties relating hereto or arising out of this Assurance is solely in the Chancery Court of Davidson County, Tennessee.

11. REPRESENTATIONS AND WARRANTIES.

11.1 Respondent represents and warrants that the execution and delivery of this Assurance is his/its free and voluntary act, that this Assurance is the result of good faith negotiations, and that Respondent believes that the Assurance and terms hereof are fair and reasonable. The party warrants that he/it will implement the terms of this Assurance in good faith.

11.2 Respondent represents that the signatory to this Assurance has the authority to act for and bind Respondent.

11.3 Respondent will not participate, directly or indirectly, in any activity to form a separate entity or corporation for the purpose of engaging in acts set forth and prohibited in this Assurance or for any other purpose which would otherwise circumvent any part of this Assurance or the spirit or purposes of this Assurance.

11.4 Acceptance of this Assurance by the State shall not be deemed approval by the State of any of Respondent's advertising or other business practices.

11.5 Within thirty (30) days of the entry of this Assurance, Respondent shall submit a copy of this Assurance to each of his officers, directors, employees and any third parties who act directly or indirectly on behalf of Respondent as an agent, independent contractor or who are or were, involved in conducting business in the State of Tennessee. Within forty-five (45) days of entry of this Assurance, Respondent shall provide the State with an affidavit verifying and certifying that all required persons have been supplied with a copy of this Assurance.

11.6 Respondent warrants and represents that he/it is the proper party to this Assurance and Agreed Order. Respondent further acknowledges that the State expressly relies upon this representation and warranty, and that if it is false, misleading, deceptive or inaccurate, the State has the right to move to vacate or set aside this Assurance and Agreed Order, and may request that Respondent be held in contempt, if the State so elects.

11.7 Respondent represents that William Andrews, individually and d/b/a Body by Me and Body 2, is the true legal name of the entity entering into this Assurance of Voluntary Compliance and Agreed Order. Respondent understands that the State expressly relies upon this representation and if this representation is false, deceptive, inaccurate or misleading, the State has the right to move to vacate or set aside this Assurance and Agreed Order, and may request that Respondent be held in contempt, if the State so

elects.

11.8 This Assurance and Agreed Order may only be enforced by the parties hereto.

11.9 The titles and headers to each section of this Assurance are for convenience purposes only and are not intended by the parties to lend meaning to the actual provisions of the Assurance.

11.10 This Assurance and Agreed Order constitutes the complete agreement of the parties with regard to the resolution of the matters set forth in the State's Petition. This Assurance is limited to resolving only matters set forth in the State's Petition.

11.11 Nothing in this Assurance shall be construed to limit the authority of the Attorney General to protect the interests of the State or the people of the State of Tennessee. In addition, this Assurance shall not bar the State or other governmental entity from enforcing other laws, regulations or rules against Respondent.

11.12 This Assurance shall be binding and effective against Respondent upon Respondent signing the Assurance.

11.13 Respondent has been advised of his right to legal counsel in connection with this matter. By declining to obtain the assistance of legal counsel, Respondent has expressly waived his right to counsel by executing this Assurance.

12. COMPLIANCE WITH ALL LAWS

12.1 Nothing in this Assurance and Order shall be construed to relieve the Respondent of the obligation to fully comply with all state or federal law(s), regulation(s), or rule(s).

13. FILING OF ASSURANCE

13.1 Upon the execution of this Assurance, the Attorney General shall prepare a Petition and file in Chancery Court for Davidson County the Petition, Agreed Order and this Assurance for the Court's approval. Respondent hereby waives any and all rights which he may have to be heard in connection with judicial proceedings upon the Petition. Simultaneously with the execution of this Assurance, Respondent shall execute an Agreed Order. This Assurance constitutes the complete agreement of the parties. The Assurance, annexed to the Agreed Order, is made a part of and is incorporated into the Agreed Order.

14. APPLICABILITY OF ASSURANCE TO RESPONDENT AND HIS SUCCESSORS

14.1 Respondent agrees that the duties, responsibilities, burdens and obligations undertaken in connection with this Assurance shall apply to William Andrews and each of his officers, directors, managers, agents, assigns, representatives, employees, partners, subsidiaries, affiliates, parents, related

entities, joint venturers, persons or other entities he controls, manages or operates, his successors and assigns, and to other persons or entities acting directly or indirectly on his behalf and Body by Me and Body 2 and each of their officers, directors, managers, agents, assigns, representatives, employees, partners, subsidiaries, affiliates, agents, related entities, joint venturers, persons or other entities they control, manage or operate, their successors and assigns, and to other persons or entities acting directly or indirectly on their behalf.

15. COSTS

15.1 All costs associated with the filing and distribution of this Assurance and any other incidental costs or expenses incurred thereby shall be borne by Respondent. No costs shall be taxed against the State as provided by Tenn. Code Ann. § 47-18-116.

16. NOTIFICATION TO STATE

16.1 For five (5) years following execution of this Assurance, Respondent shall notify the Attorney General, c/o Consumer Protection Division, 425 5th Avenue North, Second Floor, Nashville, Tennessee 37243, in writing, at least thirty (30) days prior to the effective date of any proposed changes in his business structure, such as a sale resulting in the emergence of a successor corporation or firm, the creation or dissolution or subsidiaries, or any other changes in Respondent's status that may effect compliance with obligations arising out of this Assurance.